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Supreme Court, U.S.
FILED

05-280 AUG 30 2005

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

AMERICAN FAMILY
MUTUAL INSURANCE COMPANY,

Petitioner,

v.

NICHOLAS H. SMITH, AMY AND BRYCE JOHNSON,
On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a defendant's due process rights under the Fourteenth Amendment of the United States Constitution violated when a trial court orders class notice to approximately 24,000 non-class members in an opt-out state class action and thereby forces the defendant to litigate against these non-class members, given that: (1) it is undisputed that these non-class members are identifiable; and (2) it is undisputed that these non-class members have no justiciable claim against the defendant?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, petitioner American Family Mutual Insurance Company filed a petition for writ of prohibition or mandamus with the Missouri Court of Appeals and Missouri Supreme Court relating to this action, in which it named the Honorable Edith L. Messina, Judge of the 16th Judicial District, Circuit Court of Jackson County, Missouri, as the respondent.

Corporate Disclosure Statement. Petitioner American Family Mutual Insurance Company, pursuant to Supreme Court Rule 14.1(b) and 29.6, states that no parent or publicly held company owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The Missouri Supreme Court's unreported order is reprinted at Pet. App. 1a. The Missouri Court of Appeals' unreported order is reprinted at Pet. App. 3a. The Missouri Circuit Court for Jackson County's unreported orders are reprinted at Pet. App. 4a, 7a, 20a and 23a.

BASIS FOR JURISDICTION

Procedural History Related to Jurisdiction

On November 5, 2004, petitioner American Family Mutual Insurance Company filed a motion with the Missouri Circuit Court for Jackson County, arguing that authorizing overinclusive opt-out class notice to some 24,000 identifiable non-class members who, everyone agrees, have no justiciable claim against American Family violated "the Due Process Clause of the United States Constitution." Pet. App. 55a; *see also id.* at 61a-66a. On February 24, 2005, the trial court denied American Family's motion. *Id.* at 7a-8a, ¶ 2. (American Family made this same due process argument to the trial court on several occasions. *See infra* pp. 8-10.)

On May 6, 2005, American Family petitioned the Missouri Court of Appeals for a writ of prohibition or mandamus, contending that the trial court's overinclusive notice to some 24,000 identifiable non-class members who have no justiciable claim violated "the due process clause under the Fourteenth Amendment to the United States Constitution." *Id.* at 45a; *see also id.* at 42a-46a. On May 25, 2005, the Missouri Court of Appeals denied American Family's petition. *Id.* at 3a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. WD-65420 (Mo. Ct. App. May 12, 2004) (unpublished).

On May 26, 2005, American Family petitioned the Missouri Supreme Court for a writ of prohibition or mandamus, arguing again that the trial court's overinclusive notice to some 24,000 identifiable non-class members who have no justiciable claim violated "the due process clause of the U.S. Constitution." Pet. App. at 31a; *see also id.* at 31a-38a. On June 3, 2005, the Missouri Supreme Court denied American Family's petition. *Id.* at 1a-2a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. SC-86864 (Mo. June 3, 2005) (unpublished).

Statutory Basis for Jurisdiction

Because the Missouri Supreme Court rendered a final decision on the due process claim at issue in this petition on June 3, 2005, Pet. App. at 1a-2a, the U.S. Supreme Court has jurisdiction to review the matter. *See* 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any right . . . is . . . claimed under the Constitution . . . .").

The underlying state class action raises claims of breach of contract only and the constitutional question at issue in this petition is a matter separable and collateral from the underlying litigation. Indeed, it is the trial court's order authorizing overinclusive notice that gives rise to the petition, not the claims in the underlying lawsuit. Therefore, even though further proceedings are pending in state court on the underlying breach of contract claims, jurisdiction exists in this Court to review the due process issues raised in this petition. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975) ("power of a state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review by this Court") (citing *Construction Laborers v. Curry*, 371 U.S. 542, 552 (1963)); *Mercantile National Bank v. Langdeau*,

371 U.S. 555, 558 (1963) (although trial on the merits was still pending, Supreme Court reviewed whether a federal statute immunized defendants from suit in a particular county, holding that the jurisdictional issue was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising plaintiff's cause of action"); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974) (holding that district court's imposition of 90% of the cost of class notice on defendant constituted a collateral and separable matter and, therefore, a final decision ripe for appellate review under 28 U.S.C. § 1291); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094, 1095 (5th Cir. 1977) (same).

The Supreme Court has described at least four categories of cases that are deemed final for purposes of Supreme Court review under § 1257 even when further proceedings in state court are anticipated. *Cox Broadcasting*, 420 U.S. at 477-87. As to these four categories, American Family fits neatly into at least two.

First, the Supreme Court held that a judgment is final for purposes of § 1257 if the state's highest court decides a federal issue on which the petitioning party cannot later seek review whatever the ultimate outcome of the case. *Id.* at 481. For example, if the party seeking review ultimately prevails on the merits, the federal issue will be mooted; if that party loses on the merits, state law would not permit that party to present his or her federal claim for review. *Id.* American Family fits squarely within this category. If American Family prevails on its state class action on the merits, its due process claim will be mooted by virtue of its victory. However, if American Family loses on the merits, the state court will not entertain its due process clam again. Indeed, the state court could never undue the due process violation and concomitant harm by virtue of the

fact that the trial court's order requires American Family to litigate against its own policyholders who, everyone agrees, have no justiciable claim or cognizable injury.

Second, the Court in *Cox Broadcasting* held that a judgment is deemed final under § 1257 when two things happen: (1) a federal claim has been decided by the state's highest court and the party seeking review might prevail on the merits on non-federal grounds, which would render review unnecessary on the federal issue; and (2) refusal to review the state court proceedings would seriously erode federal policy. *Id.* at 482-83. Again, if American Family prevails on the breach of contract claim, its due process claim would be moot. Moreover, if the U.S. Supreme Court vacates the trial court's order authorizing overinclusive notice, it would prevent American Family from litigating against non-class members. The trial court has acted outside its judicial and jurisdictional powers by allowing some 24,000 identifiable non-class members who have no justiciable claim to join a state class action. Allowing a state court to force a defendant to litigate against individuals with no justiciable claims, by definition, seriously erodes federal policy and contravenes notions of due process. Accordingly, American Family also fits within this category of cases deemed final for purposes of review under § 1257.

In *Cox Broadcasting* itself, the Supreme Court granted immediate review of a state court judgment that upheld the constitutionality of a statute authorizing suit against the press for publishing the name of a rape victim. The Court did so despite the fact that the state's highest court had remanded the case for trial on the merits. *Id.* at 485-86. This case is analogous to the facts in *Cox Broadcasting* in terms of finality. In another case, the Supreme Court treated a state court's order to quash service and vacate a sequestration order as final, holding that the defendant had only a choice between "suffering a default